APPENDIX A — JUDGMENT AND BENCH OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED SEPTEMBER 30, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-4137

IN RE: ROBERT E. BROWN; DOROTHY L. BROWN,

Debtors

v.

WALLACE E. TURNER; JOANN M. TURNER

Robert E. Brown; Dorothy L. Brown,

Appellants

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. No. 01-cv-01459)
District Judge: Honorable John E. Jones, III

Argued September 9, 2003

BEFORE: BARRY, BECKER, and GREENBERG,
Circuit Judges.

JUDGMENT

Appendix A

This case came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was submitted under Third Circuit LAR 34.1(a) on September 9, 2003.

On consideration whereof, it is hereby ADJUDGED and ORDERED by this court that the order of the District Court entered on October 21, 2003, be and the same is hereby AFFIRMED. The mandate to issue forthwith.

ATTEST:

s/ [illegible]
Chief Deputy Clerk

DATED: September 30, 2003

Appendix A

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(Filed: September 30, 2003)

BENCH OPINION

Appendix A

Becker, *Circuit Judge.*

Let me begin by commending both Mr. Kodak and Mr. Schweikert on their candor with the Court and their forceful exposition of their clients' claims. However, we have read the opinions of Judge Woodside and Judge McClure and are satisfied that they got it right. The standards which are generally applied by virtually all courts across the land in determining whether a motion for relief from automatic stay satisfies the requisites of an informal proof of claim under the Bankruptcy Code are those stated in *In re McCoy Management Services, Inc.*, 44 B.R. 215 (B.R. W.D. Ky. 1984):

> courts have interpreted the Bankruptcy Code and the Bankruptcy Rule to require five elements in order for an informal proof of claim to be valid and amendable:
>
> (1) the proof of claim must be in writing;
>
> (2) the writing must contain a demand by the creditor on the debtor's estate;
>
> (3) the writing must express an intent to hold the debtor liable for the debt;
>
> (4) the proof of claim must be filed with the Bankruptcy Court; and
>
> (5) based on the facts of the case, it would be equitable to allow the amendment.

> These requirements are not stricti juris in the sense that any minor deviation will be fatal to the claim. They merely state broad general guidelines, judicially formulated, which must be followed if a claim is to be allowed.

Id. at 217-18. We too will apply them.

I will not take the time to recite the facts and procedural history—the tortuous facts and long procedural history of this unfortunate case, which deserves at this late date to be disposed of quickly. The panel is satisfied that no valid purpose would be served to taking this matter under advisement and writing a lengthy opinion. We are satisifed that the motion for relief from automatic stay, which is found at the Appendix, pages 16A-18A, does meet the *McCoy* requirements—it is in writing; it contains a demand by the creditor on the debtor's estate; it expresses an intent to hold the debtor liable for the debt; it has been filed with the Bankruptcy Court; and we feel that it would be equitable to allow the amendment.

Mr. Kodak has very forcefully argued that the Turners have in effect abjured proceeding under the Bankruptcy Code and have in effect forfeited their right to contend that they have a valid informal proof of claim by stating that "they don't have a claim." However, we are satisfied that that statement is a function of the rather unusual Illinois statute and procedures which give the disappointed *seller* the right to claim some kind of equitable damages against the buyer who does not fulfill a contract for sale of real estate. We do not see the Turners having announced or telegraphed that they do not have a claim. Indeed the history of this litigation

suggests that they have and that they have long felt that they do. We are satisfied that there was an informal proof of claim filed here. Judge McClure in his opinion affirming Judge Woodside's order was satisfied that there was a valid informal proof of claim filed here, and we are satisfied that both Judge Woodside and Judge McClure were correct. The notice of appeal is from the order entered October 21, 2001. That order will be affirmed and this bench opinion will be transcribed and constitute the opinion and judgment of the Court. The formal judgment of the Court will follow. I simply want to add that Judge McClure's order concludes:

> We agree with the Bankruptcy Court that the motion for relief from the stay constitutes an informal proof of claim subject to amendment after the claims bar date since attorneys properly amended their proof of claim, the claim is not barred.

We announce our endorsement of that. Judge Barry, anything to add?

Judge Barry: I would simply add as Judge Becker noted that the final order in this case was not Judge McClure's but was entered by the Honorable John E. Jones, III.

Judge Becker: Yes, of course, it was Judge Jones. Judge McClure did the opinion, but the order was done by Judge Jones.

Judge Barry: The attorneys have argued this very, very capably and we thank them for that.

/s/ Edward R. Becker
Circuit Judge

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA DATED OCTOBER 10, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BANKRUPTCY NO: 1-95-01144
CHAPTER 11

IN RE:

ROBERT E. BROWN AND DOROTHY L. BROWN,

Debtors

DOCKET NO. 4:01-CV-01459
(Judge Jones)

WALLACE E. TURNER AND JOANN M. TURNER,

Movants

v.

ROBERT E. BROWN AND DOROTHY L. BROWN,

Respondents

ORDER

October 10, 2002

Appendix B

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

Before us is an appeal of an order entered by this District's late bankruptcy Chief Judge Robert Woodside. This action commenced as a result of a real estate transaction. In 1992 the Turners (Movants) agreed to sell their Illinois home to the Browns (Debtors). The Debtors reneged on the sales agreement which prompted an Illinois court to award a judgment in favor of Movants for specific performance. On June 14, 1995 the Debtors filed a chapter 11 bankruptcy in the United States Bankruptcy Court for the Middle District of Pennsylvania.

Movants filed a motion for relief from the automatic stay in order to compel the specific performance sale of their home. Judge Woodside entered an order finding that the motion for relief from the stay constituted an informal proof of claim on the part of the Movants. The Debtors appealed the order to the District Court. On November 25, 1998, Judge James McClure, of this court, entered an order affirming the bankruptcy court's finding and remanding the matter back to bankruptcy court for further proceeding.

On February 28,1997, Judge Woodside entered an order reducing Movants' judgment to one for money damages and directed that the damages be calculated based upon the sale of Movants' house. Thereafter, the property was sold to a third party, and on June 25, 2001, Judge Woodside entered an order in which he ordered the Debtors to pay the Movant's the calculated damage sum of $36,984.44. On August 1, 2001 Debtors filed an appeal of this order. The appropriate briefs

were filed and this matter has been ready for disposition since August 30, 2001. On August 6, 2002, Judge McClure issued an order which transferred responsibility for this appeal to the undersigned.

It is apparent from our considerations of the briefs that the Debtors have simply resurrected the argument that the Movants have not filed a proper proof of claim, as previously made to Judge McClure in 1998.

Debtors' current appeal does not attack any of the factual findings contained in Judge Woodside's order. Debtors simply return to the argument that Movants failed to file a formal proof of claim which either bars or greatly restricts their ability to recover damages.

We affirm Judge Woodside's order based the law of the case doctrine. "Unlike the more precise requirements of res judicata, law of the case is an amorphous concept. As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case. Law of the case directs a court's discretion, it does not limit the tribunal power." *Arizona v. California*, 460 U.S. 605, 618 (1983). "The law of the case doctrine expresses the practice of courts generally to refuse to reopen what has been decided. Law of the case restrictions apply to subsequent rulings by the same judge in the same case or a closely related one. Although a trial judge has the power to reconsider an earlier decision, its authority to do so is limited by two prudential considerations: First, the court must explain on the record the reasoning behind its decision to reconsider

the prior ruling. Second, the court must take appropriate steps so that the parties are not prejudiced by reliance on the prior ruling." *In re RBGSC Investment corporation*, 253 B.R. 352 citing *Raquel v. Education Management Corp.*, 196 F.3d 171, 183 (3d Cir. 1999)(internal citations omitted).

Simply stated, Judge Woodside and Judge McClure, of this court, have already determined the issue of whether Movants filed a proper proof of claim. We will not review an issue which has already been decided in this case. In particular it is inappropriate for this Court to disrupt and reconsider the learned analysis and conclusions of the two distinguished jurists, who in effect plowed this same field before our opportunity to do so.

We are therefore exercising our discretion under the law of the case doctrine.

ACCORDINGLY, WE ENTER THE FOLLOWING ORDER:

1. Judge Woodside's order of June 25, 2001 is affirmed.

2. This case is remanded back to the bankruptcy court for further proceedings consistent with this order.

3. The Clerk of Court is directed to close this file.

s/ John E. Jones III
John E. Jones III
United States District Judge

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA DATED JUNE 25, 2001

UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Case No.: 1-95-01144

Chapter 11

IN RE:

ROBERT E. BROWN AND DOROTHY L. BROWN,

Debtors

WALLACE E. TURNER AND JOANN M. TURNER,

Movants

v.

ROBERT E. BROWN AND DOROTHY L. BROWN,

Respondents

MEMORANDUM

Procedural and Factual History

Appendix C

In March, 1992, Wallace E. and Joann M. Turner (Movants) agreed to sell their Illinois home to Robert E. and Dorothy L. Brown (Debtors) for $317,500.00 on June 9, 1992. Shortly before the closing date, Debtors reneged on their offer. Debtors then sued Movants in state court to recover their down payment. Movants countersued for specific performance. After some lengthy litigation, Movants obtained judgment.

Prior to the date for the court-ordered closing on the home, Debtors filed in Chapter 11. Another lengthy period of litigation followed as Movants attempted to prevent Debtors from altering through this Court the specific performance order. On February 28, 1997, I issued an Order to reduce Movants' judgment to one for money damages. My Order compelled Movants to sell their home under certain conditions and then to file a Motion for damages. In March, 1997, the home was sold for $285,000.00. The Movants then filed a Motion for payment of damages as prescribed. A hearing was held on that Motion, and the matter is now ready for decision.

I have jurisdiction over this matter pursuant to 28 U.S.C. §§157 and 1334. To the extent that it is a determination of the amount and validity of a claim, this matter is core in nature pursuant to 28 U.S.C. §157(b)(2)(B). To the extent that it is a decision on the merits of a contractual dispute that may have some impact on the bankruptcy estate, it is non-core but related to the bankruptcy case. *See, In re Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984). Neither party has objected to my jurisdiction to make a final decision on the merits, and thereby they have impliedly consented to

entry of final judgment by this Court. *See*, *In re M.A. Baheth Construction Co.*, 118 F.3d 1082 (5th Cir. 1987), *cert. denied*, 522 U.S. 1092 (1997); *Abramowitz v. Palmer*, 999 F.2d 1274 (8th Cir. 1993).

Discussion

My February 28, 1998 Order stated that damages were to be awarded in the following categories: (1) the difference between the selling price and $317,500.00; (2) liquidated damages of $2,224.18 as initially ordered by the Illinois state court; (3) incidental damages to be specifically pleaded and proven in a subsequent proceeding. As there is little dispute regarding the first two categories of damages, the Movants shall be awarded $32,500.00 - the difference between the actual selling price for the house and the contract price with the Debtors. Movants shall also be awarded the amount of $2,224.18 in accordance with the initial Illinois proceeding.

In support of their case for damages in the third category, the Movants' cite *First National State Bank of New Jersey v. Commonwealth Federal Savings and Loan Association of Morristown*, 610 F.2d 164, 174 (3rd Cir. 1979) for the proposition that damages should be calculated so as to put them in the same position they would have occupied had the Debtors not breached their promise. While I generally agree with this proposition, I must note that Movants' case involves an Illinois land transaction and an Illinois sales contract which is governed by Illinois law. Therefore, I must be guided in the instant decision by Illinois law. *See*, *In re Fineberg*, 202 B.R. 206 (Bankr.E.D.Pa. 1996), (when laws of two states may apply to parties' contract dispute, court looks to conflicts

of law rules of the jurisdiction in which it sits. Pennsylvania courts apply the law of the state with the most significant relationship to the contract in dispute.)

In breach of contract actions under Illinois law, a monetary award of damages should, to the extent possible, put the non-breaching party in the position he would have been in had the contract been performed. *Naiditch v. Shaf Home Builders, Inc.*, 160 Ill.App.3d 245, 267, 512 N.E.2d 1027 (1987). "[T]he plaintiff bears the burden of proving that he or she sustained damages resulting from the breach and establishing both the correct measurement of damages and the final computation of damages based on that measurement." *Olivier v. Alden*, 634 N.E.2nd 418 (1994), *citing*, *First National Bank v. Dusold* 180 Ill.App.3d 714, 718, 536 N.E.2d 100 (1989). A plaintiff to a breach of contract action is not entitled to a windfall. *Kalal v. Goldblatt Brothers, Inc.*, 53 Ill.App.3d 109, 112, 368 N.E.2d 671 (1977).

Under Illinois law, when a buyer breaches a contract to purchase real estate,

> a proper measure of the element of damages for the real estate itself is the difference between the contract price and the market price on the date of the breach. However, there is nothing . . . to suggest that this is the only element of damages. The general rule on contract damages is that they are recoverable as they may fairly and reasonably be considered to have arisen naturally from the breach of the contract itself, or such as may reasonably be

> supposed to have been in the contemplation of the parties as they made the contract.

Sheppard v. Fagan, 418 N.E.2d 876 (Ill.App. 1Dist. 1981); *see also*, *Crown Life Ins. Co. v. American Nat. Bank and Trust Co. of Chicago*, 830 F.Supp. 1097 (N.D.Ill. 1993).

Movants herein request damages for expenses incurred in hunting a new residence. I find such damages to have arisen naturally from Debtors' breach of promise. Movants request damages of $560.48[1] in travel-related expenses, e.g. airline fares, car rental, gasoline, etc., for trips that they took to find a new home on the East coast, in reliance on the Debtors' promise to purchase their house. I find the amount requested more than reasonable.[2] An order will be entered requiring payment in this amount.

Movants also seek damages for certain ordinary household expenses (i.e. insurance, mortgage interest, taxes, and home maintenance) that they incurred by having to remain at the Illinois home. Movants aver that they would not have incurred such expenses for the Illinois home if Debtors had purchased the house as agreed. On its face, this averment

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1. Movants' exhibit which summarizes and totals their damages actually shows total travel expenses of only $430.48. However, there appears to have been a miscalculation in this total, as it does not include an expense of $130.00 for ten days airport parking.

2. Eight flights from Chicago to various East coast destinations cost the Movants only a total of $168.30. Movant Wallace Turner is a retired airline pilot who receives substantial discounts on airfares as a result of his previous employment.

appears sound, but it is untenable as a basis *by which to calculate damages* because it is based on the false premise that they would have incurred no ordinary household expenses themselves, at another home, if Debtors had purchased the house.

Movants intended to move to an apartment in Syracuse, New York, if the sale to Debtors had been consummated. Of course, Movants might reasonably assert that, at an apartment, their utility and maintenance expenses would have been smaller than those of their "upscale" Illinois home. However, Movants' claim for damages neither takes into account nor proves the expenses they would have incurred at an apartment. While Movants could reasonably assert that Debtors are responsible for the *difference* between what they would have paid at an apartment and what they did pay at the Illinois home, without any proof whatsoever of how much they would have spent on living expenses at a Syracuse apartment, I cannot calculate damages. Thus Movants have failed to sustain their burden of proof as to such damages.

Movants next request reimbursement of moving expenses in the amount of $1,699.78. While the move did not actually occur, it appears that reasonable expenses were incurred for the packing of household items and the rental of a truck. Thus, this expense will also be allowed.

Movants also request damages for "Losses Incurred in Replacing Items Disposed of in Anticipation of Settlement and Move." These damages are based on the Movants' having, in reliance on Debtors' promise, sold or given away certain personalty (lawn mowers, living and dining room furniture, small appliances and decorations) which they

would not need at their new residence, and then having replaced them when the Debtors reneged on closing.

Movants' theory of recovery is basically sound, but again, their proof is incomplete. It was reasonable for Movants to sell or give away unneeded home furnishings in reliance on Debtors' promise to purchase. It was reasonable for them to replace those items after the deal fell through. However, it would appear to be a pure windfall to Movants if Debtors should be responsible for the replacement cost (as Movants request) rather than for the estimated value of the items sold or given away. Movants offer no cases to support their position on this issue, and I have found none that would do so.

In addition, there is no evidence of what happened to the new, replacement items after Movants finally sold the house. Were those items sold? If so, what did Movants get for them? Were they sold with the house? If so, what was the value attached to them? Like with Movants ordinary household expenses, Debtors would only be liable for the *difference* between the replacement cost and the resale price. Again, since Movants present no evidence on this issue, they fail to carry their burden of proof. *See*, *Bowman v. Zinny*, 256 Ill.App.3rd 386, 628 N.E. 2nd 384 (1993) ("damages cannot be based on mere speculation or conjecture.") Therefore, damages will be denied in this category as well.

Finally, Movants demand the inclusion of pre-judgment interest on their claim. On the subject of pre-judgment interest on a claim for breach of contract, Illinois law provides that judgment creditors shall be allowed to receive interest at an annualized rate of 5% for all moneys after they become due

"on any bond, bill, promissory note, or other instrument of writing". *Cushman & Wakefield of Ill., Inc. v. Northbrook 500 Ltd. Partnership*, 112 Ill.App.3d 951, 445 N.E.2d 1313 (1983); *citing*, Ill.Rev.Stat. 1981 Ch. 17, para. 6402.[3]

It is not clear that a real estate contract meets the statutory requirement for an "instrument of writing". *Spagat v. Schak*, 130 Ill.App.3rd 130, 473 N.E.2d 988 (1985); but *see*, *Cummings v. Beaton & Associates, Inc.*, 249 Ill.App.3rd 287, 618 N.E.2d 292 (1992). Regardless, in order to invoke the pre-judgment interest statute, "the amount due [must] be a fixed or easily ascertainable amount. . . ." *Cushman*, 445 N.E. at 1321; *see also*, *Stevenson v. ITT Harper, Inc.*, 51 Ill.App.3d 568, 366 N.E.2d 561 (1977); *Kansas Quality Construction, Inc. v. Chiasson*, 112 Ill.App.2d 277, 250 N.E.2d 785 (1969). Prejudgment interest is not allowed on unliquidated claims even if the claim is based on an instrument of writing. *Spagat*, at 994. Damages ascertainable by computing the difference between the contract price and the fair market value of the property are sufficiently liquidated to base prejudgment interest unless, at the time of the breach, said market value was disputable. *Farwell Construction Co. v. Ticktin*, 84 Ill.App.3d 791, 405 N.E.2d 1051 (1980).

In the instant case, the market value of the property on the date of the breach was clearly disputable. Movants' inability to sell the home for several years post-breach is evidence enough of that. Therefore, pre-judgment interest is not allowable under Illinois law.

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3. This statute is currently cited at IL.ST.CH. 815 §205/2.

Appendix C

For the above-discussed reasons, damages will be assessed against the Debtors in the amount of $36,984.44. These damages constitute a non-dischargeable debt payable through Debtors' plan of reorganization. All debts have been paid through that plan already. The plan proposes immediate and full payment to all unsecured creditors. Movants are entitled to the same treatment as all other unsecured creditors. Therefore, Debtors will be ordered to immediately pay to the Movants the sum of $36,984.44.

An Order implementing these conclusions is attached.

BY THE COURT

s/ Robert J. Woodside
ROBERT J. WOODSIDE
CHIEF BANKRUPTCY JUDGE

HARRISBURG, PENNSYLVANIA

Appendix C

UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Case No.: 1-95-01144

Chapter 11

IN RE:

ROBERT E. BROWN AND DOROTHY L. BROWN,

Debtors

WALLACE E. TURNER AND JOANN M. TURNER,

Movants

v.

ROBERT E. BROWN AND DOROTHY L. BROWN,

Respondents

ORDER

AND NOW, this 25th day of June, 2001, Debtors are hereby ordered to pay to the Movants, within thirty days, the sum of $36,984.44.

Appendix C

BY THE COURT

s/ Robert J. Woodside
ROBERT J. WOODSIDE
CHIEF BANKRUPTCY JUDGE

HARRISBURG, PENNSYLVANIA

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR PANEL REHEARING DATED NOVEMBER 3, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 02-4137

IN RE: ROBERT E. BROWN, M.D.; DOROTHY L. BROWN,

Debtors

v.

WALLACE E. TURNER; JOANN M. TURNER

Robert E. Brown; Dorothy L. Brown,

Appellants

BEFORE: BARRY, BECKER, and GREENBERG,
Circuit Judges.

SUR PETITION FOR PANEL REHEARING

The petition for rehearing filed by appellants having been submitted to the judges who participated in the decision of this court and no judge who concurred in the decision having asked for rehearing, the petition for panel rehearing is DENIED.

Appendix D

BY THE COURT:

/s/ Edward R. Becker
Circuit Judge

DATED: November 3, 2003

APPENDIX E — STATUTE INVOLVED

11 U.S.C. § 1111

§ 1111 Claims and interests

(a) A proof of claim or interest is deemed filed under section 501 of this title for any claim or interest that appears in the schedules filed under section 521(1) or 1106(a)(2) of this title, except a claim or interest that is scheduled as disputed, contingent, or unliquidated.

(b)(1)(A) A claim secured by a lien on property of the estate shall be allowed or disallowed under section 502 of this title the same as if the holder of such claim had recourse against the debtor on account of such claim, whether or not such holder has such recourse, unless—

(i) the class of which such claim is a part elects, by at least two-thirds in amount and more than half in number of allowed claims of such class, application of paragraph (2) of this subsection; or

(ii) such holder does not have such recourse and such property is sold under section 363 of this title or is to be sold under the plan.

(B) A class of claims may not elect application of paragraph (2) of this subsection if—

(i) the interest on account of such claims of the holders of such claims in such property is of inconsequential value; or

(ii) the holder of a claim of such class has recourse against the debtor on account of such claim and such property is sold under section 363 of this title or is to be sold under the plan.

(2) If such an election is made, then notwithstanding section 506(a) of this title, such claim is a secured claim to the extent that such claim is allowed.